IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J. A., MDEMU, J.A. And ISSA, J.A.)

CRIMINAL APPEAL NO. 135 OF 2020

MUSSA DAUD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgement of the High Court of Tanzania at Mwanza)

(Manyanda, J.)

dated the 9th day of October, 2020

in

Criminal Appeal No. 38 of 2020

.....

JUDGMENT OF THE COURT

6th & 13th December, 2023

MDEMU, J.A.:

This appeal by Mussa Daud, the appellant herein is challenging the judgment of the High Court of Tanzania at Mwanza which upheld the conviction entered against the appellant by the Resident Magistrate's Court of Geita (the trial court) for the offence of rape. In the trial court, the

appellant was arraigned for one count of rape contrary to sections 130 (1) (2) and 131 (3) of the Penal Code, Cap. 16 R.E. 2002; now R.E. 2022. In the contents of the particulars of the offence, on 19th February, 2017 at Nyarugusu area within the District and Region of Geita, the appellant had carnal knowledge of one "JL" or PW1 (as disguised for identity purposes). As to a prison term of thirty (30) years imposed by the trial court, the High Court found it illegal and instead, enhanced it to life sentence on account that "JL" at the time, was of 8 years of age.

Briefly, it was alleged that, while the appellant was at his barbershop on the incident date, "JL" went there for shaving services. Other little children were also there. The appellant then shaved "JL" as instructed but in the end, raped her. By then, the other little children had their ways off the barbershop. "JL" thereafter rushed home where she reported the incident to her mother one Kulwa Clement (PW2), naming the appellant to be her ravisher. In a further step, PW2 made a preliminary examination to PW1's private parts and thereafter went to the barbershop with her. When quizzed,

the appellant refuted his involvement in the offence. PW2 then reported the matter to police, where she was issued with a PF3 and thereafter rushed PW1 to Geita hospital for examination and treatment.

The appellant was subsequently arrested and tried, as hinted earlier. In his sworn defence, he denied responsibility. However, as said, he was convicted and subsequently sentenced to serve thirty (30) years prison term. His appeal to the High Court was not successful and unluckily to the appellant, the sentence was enhanced to life imprisonment.

Aggrieved, the appellant appealed to this Court by lodging 7 grounds of appeal which are bridged into the following grounds of complaint: **One**, the prosecution case was not proved; **two**, the life sentence was wrongly enhanced in the absence of proof of the age of the victim; and **three**, the evidence of PW1, being a child of tender age, was irregularly received.

At the hearing of the appeal on 6th December, 2023, the appellant appeared in person, unrepresented, whereas the respondent Republic was represented by Ms. Jaines Kihwelo, Ms. Naila Chamba and Mr. Mahembega

Elias Mtiro, learned State Attorneys. At the commencement of the hearing of the appeal, the appellant opted first to hear the submission of the respondent Republic and would rejoin thereafter.

It was now the turn of the respondent to submit, led by Ms. Kihwelo who was the lead counsel. Submitting on whether the prosecution case was proved beyond reasonable doubt, the learned State Attorney argued that, the evidence of the victim of sexual offence, that is PW1, is the best evidence within the test in **Seleman Makumba v. Republic** [2006] TLR 379 because she testified that on the incident date, the appellant raped her at his barbershop, a fact which she reported to PW2. The latter, according to the learned State Attorney, made a preliminary physical examination where she discovered some bruises in PW1's private parts.

Having this evidence, Ms. Kihwelo commented on the credence of PW1 and PW2's evidence to be credible, thus dismissed the complaint of the appellant that the said evidence should not be trusted on account that, it was from members of the same family which, in the appellant's view, needed

independent witness to corroborate it. She thus referred us to the case of **Tatizo Juma v. Republic**, Criminal Appeal No. 10 of 2013 (unreported) insisting that, what is relevant in the evidence from members of the same family is its reliability and once this exists, then it may not be trusted merely because it emanates from members of the same family. On that account, she did not conceive the rationale to have independent evidence to corroborate that evidence.

Regarding the life sentence, Ms. Kihwelo submitted that, the High Court rightly enhanced the sentence from thirty (30) years prison term to life sentence because the prosecution proved the age of PW1 to be 8 years. She referred us at page 17 of the record of appeal elaborating that, PW2 who was a mother of PW1 also proved PW1 to be of 8 years of age.

Submitting as to whether the evidence of PW1 was properly received, Ms. Kihwelo stated that, section 127 (2) of the Evidence Act, Cap. 6 requiring a witness of tender age to promise to tell the truth and not lies was fully complied with. Making reference to page 15 through 16 of the record of

appeal, the learned State Attorney argued that, the trial Magistrate made an inquiry and, it was in that course when PW1 made the requisite promise. When probed on the question asked to PW1 by the trial Magistrate in that inquiry, that is "*do you know how to speak the truth*" and the response by PW1 was "*it is wrong to say lie*" if at all amounted to the making of a promise, the learned State Attorney submitted that, the said phrases amounted to a promise of telling the truth and not to tell lies.

The learned State Attorney's final remarks were with regard to the probed issue as to what would be the relevance of the evidence of PW2 in case the evidence of PW1 is expunged due to being irregularly received. She remarked that, under the circumstances of this case, the evidence of PW2 may not stand alone to prove the offence of rape which the appellant was convicted of.

It was now the turn of the appellant to rejoin. His was brief. **First,** he attacked the evidence of PW1 to be weak and uncorroborated, thus may not sustain the conviction met to him. **Second,** he submitted that, in

absence of the evidence of a medical practitioner who examined PW1, the evidence of PW2 cannot in itself prove that PW1 sustained bruises in her private parts. **Last** in his submission was that, the offence of rape was not proved for want of evidence from the PF3, medical practitioner and the Village Executive Officer. He therefore prayed to be released for no offence proven committed by him.

Having heard and considered the submissions of the parties and the entire record of appeal, we find it clear from the outset that, only two witnesses, that is the victim (PW1) and her mother (PW2) testified. It is from that evidence which both courts below relied on to ground conviction. This is settled. The question now is whether, we may deploy that evidence to determine the criminal responsibility of the appellant as observed by the two courts below.

In resolving this issue, we find it relevant to commence with ground three on the legality of procurement of the evidence of PW1 who was a witness of tender age. In this, the provision of section 127 (2) of the

Evidence Act is clear that, a witness of tender age is allowed to testify on oath or affirmation or without oath or affirmation. See also in **Seleman Moses Sotel @ White v. Republic**, Criminal Appeal No. 385 of 2018 (unreported). Where evidence of a witness of tender age is taken without oath or affirmation, then a promise to tell the truth and not tell lies before reception of that evidence must be made by that witness. We reproduce the relevant part of that section as hereunder for ease of reference:

> *"127 – (1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.*
>
> *(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

In the instant appeal, it is obvious from the record that, PW1 did not testify on oath or affirmation. Next is whether the requirement in the quoted sub section regarding the promise was met. Did PW1 make any promise? Ms. Kihwelo asserted in the affirmative. The appellant was silent on this. On our part, we first let the record of appeal at page 15 through 16 speak for itself regarding this fact as hereunder:

> *"PW1: Jane Lucas, Msukuma, aged 8 years, Religion Christian.*
>
> *Court: The witness Jane Lucas is a child and for those reasons, this court should conduct an inquiry to prove whether she knows the nature of an oath or she is possessed of sufficient intelligence and understand how to speak the truth.*
>
> *Court: Are you a school girl?*
>
> *PW1: I am a school girl of standard III at Nyarugusu Primary School.*
>
> *Court: Do you know the nature of oath?*

PW1: I don't know.

Court: Do you know how to speak the truth?

PW1: It is wrong to tell lie.

Court: It seems to this court that PW1 knew the duty of speaking the truth, for that reason her evidence will be taken without oath."

The question we are asking ourselves is whether the reproduced passage above entails the making of a promise on the part of PW1. Our observation in this one is in the negative. Nowhere in the reproduced passage one can gather information on the existence of the promise. Neither in the questions asked nor in the answers recorded nor in the recorded opinion of the trial magistrate we may deduce existence of the said promise. That notwithstanding, in our considered view, the promise envisioned under the provisions of section 127 (2) of the Evidence Act must be direct and in express terms made by the witness of tender age and not to be inferred from phrases made as argued by the leaned State Attorney. This, in our view, was the intention of the Legislature. We are therefore certain and

satisfied that, the trial court recorded the evidence of PW1 without requiring her to promise to tell the truth and not to tell lies.

Having resolved that issue, next is what is the legal consequence of the evidence of a witness of tender age taken without a prior promise to tell the truth and not tell lies. The jurisprudence is rich on this aspect. Just one to mention is the case of **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported) supplied to us by the learned State Attorney, at page 14, this Court stated that:

> *"In this case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied with before taking the evidence of victim. In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No. 4 of 2016. Hence, the same has no evidential value. Since the crucial evidence of PW1 is invalid, there is no evidence remaining to be corroborated by the evidence of PW2, PW3 and PW4 in view of*

sustaining the conviction. In the circumstances, we find the 4th ground of appeal to be meritorious and hence we sustain it."

In the instant case, as we alluded to above, PW1 never made a promise before her evidence was received by the trial court. In our view therefore, we are constrained to expunge her evidence from the record. Having done so, we are left with the evidence of PW2. Hers would be hearsay, and we hold so. Our observation is not farfetched. All what PW2 testified was the information she received from PW1 whose evidence has been expunged from the record for want of evidential value. As the Court held in **Godfrey Wilson v. Republic** (supra), there is no evidence on record to corroborate the evidence of PW1. In the circumstances, we are of the firm view that, the prosecution case was not proved to the required standard such that the appellant herein was not the perpetrator of the offence of rape as he stood charged, convicted and sentenced. As this ground of appeal alone disposes of the whole appeal, we are not going to deliberate on the remaining grounds of appeal.

Accordingly, we allow the appeal. The conviction is thus quashed, and the life sentence imposed on the appellant is thus set aside. We order immediate release of the appellant from custody, else held for some other lawful causes. It is so ordered

DATED at **MWANZA** this 12th day of December, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

Judgment delivered this 13th day of December, 2023 in the presence of the Appellant in person and Mr. Benedictor Ruguge, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL